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8 **UNITED STATES DISTRICT COURT**
9 **SOUTHERN DISTRICT OF CALIFORNIA**
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11 RAMON MURILLO,
12 CDCR # P-43503,

13 Plaintiff,

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15 vs.
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18 IAN PARKINSON; COUNTY OF SAN
19 LUIS OBISPO; ULLOA; MAYES; ADAMS;
20 MANPAL; RUSHING; P. FLOURNEY; T.
GOFF; VILLAROMAN; DENNIS MORRIS;
CHARLES MARSH; JOHN DOES 1-5,

21 Defendants.
22
23

Civil No. 11-1687 BEN (BGS)

ORDER:

**(1) GRANTING MOTION TO
PROCEED *IN FORMA PAUPERIS*
[ECF No. 3];**

**(2) DENYING MOTION FOR
APPOINTMENT OF COUNSEL
[ECF No. 4];**

AND

**(3) DISMISSING COMPLAINT
FOR FAILING TO STATE
A CLAIM PURSUANT TO
28 U.S.C. §§ 1915(e)(2)(B) & 1915A(b)
AND FOR LACK OF PROPER
VENUE**

24 Plaintiff, a state inmate currently incarcerated at the Richard J. Donovan Correctional
25 Facility (“RJD”), California, and proceeding pro se, has filed a civil rights Complaint pursuant
26 to 42 U.S.C. § 1983. In addition, Plaintiff has filed a Motion to Proceed *In Forma Pauperis*
27 (IFP) pursuant to 28 U.S.C. § 1915(a) [ECF No. 3], and a Motion for Appointment of Counsel
28 [ECF No. 4].

I. MOTION TO PROCEED IFP

All parties instituting any civil action, suit or proceeding in a district court of the United States, except an application for writ of habeas corpus, must pay a filing fee of \$350. *See* 28 U.S.C. § 1914(a). An action may proceed despite a party's failure to pay only if the party is granted leave to proceed IFP pursuant to 28 U.S.C. § 1915(a). *See Andrews v. Cervantes*, 493 F.3d 1047, 1051 (9th Cir. 2007); *Rodriguez v. Cook*, 169 F.3d 1176, 1177 (9th Cir. 1999). Prisoners granted leave to proceed IFP however, remain obligated to pay the entire fee in installments, regardless of whether the action is ultimately dismissed for any reason. *See* 28 U.S.C. § 1915(b)(1) & (2).

The Court finds that Plaintiff has submitted an affidavit which complies with 28 U.S.C. § 1915(a)(1), and that he has attached a certified copy of his trust account statement pursuant to 28 U.S.C. § 1915(a)(2) and S.D. CAL. CIVLR 3.2. Plaintiff's trust account statement shows that he has insufficient funds from which to pay an initial partial filing fee.

Accordingly, the Court **GRANTS** Plaintiff's Motion to Proceed IFP [ECF No. 3] and assesses no initial partial filing fee per 28 U.S.C. § 1915(b)(1). However, the Court further orders the Secretary of the California Department of Corrections and Rehabilitation ("CDCR") to garnish the entire \$350 balance of the filing fees owed in this case, collect and forward them to the Clerk of the Court pursuant to the installment payment provisions set forth in 28 U.S.C. § 1915(b)(1).

II. MOTION FOR APPOINTMENT OF COUNSEL

Plaintiff also requests the appointment of counsel to assist him in prosecuting this civil action. The Constitution provides no right to appointment of counsel in a civil case, however, unless an indigent litigant may lose his physical liberty if he loses the litigation. *Lassiter v. Dep't of Soc. Servs.*, 452 U.S. 18, 25 (1981). Nonetheless, under 28 U.S.C. § 1915(e)(1), district courts are granted discretion to appoint counsel for indigent persons. This discretion may be exercised only under "exceptional circumstances." *Terrell v. Brewer*, 935 F.2d 1015, 1017 (9th Cir. 1991). "A finding of exceptional circumstances requires an evaluation of both the 'likelihood of success on the merits and the ability of the plaintiff to articulate his claims pro se

1 in light of the complexity of the legal issues involved.’ Neither of these issues is dispositive and
 2 both must be viewed together before reaching a decision.” *Id.* (quoting *Wilborn v. Escalderon*,
 3 789 F.2d 1328, 1331 (9th Cir. 1986)).

4 The Court denies Plaintiff’s request without prejudice because, for the reasons set forth
 5 below, neither the interests of justice nor exceptional circumstances warrant appointment of
 6 counsel at this time. *LaMere v. Risley*, 827 F.2d 622, 626 (9th Cir. 1987); *Terrell*, 935 F.2d at
 7 1017.

8 **III. SCREENING PURSUANT TO 28 U.S.C. §§ 1915(e)(2) & 1915A(b)**

9 The Prison Litigation Reform Act (“PLRA”)’s amendments to 28 U.S.C. § 1915 also
 10 obligate the Court to review complaints filed by all persons proceeding IFP and by those, like
 11 Plaintiff, who are “incarcerated or detained in any facility [and] accused of, sentenced for, or
 12 adjudicated delinquent for, violations of criminal law or the terms or conditions of parole,
 13 probation, pretrial release, or diversionary program,” “as soon as practicable after docketing.”
 14 *See* 28 U.S.C. §§ 1915(e)(2)(B) and 1915A(b). Under these provisions, the Court must sua
 15 sponte dismiss any prisoner civil action and all other IFP complaints, or any portions thereof,
 16 which are frivolous, malicious, fail to state a claim, or which seek damages from defendants who
 17 are immune. *See* 28 U.S.C. §§ 1915(e)(2)(B) and 1915A; *Lopez v. Smith*, 203 F.3d 1122, 1126-
 18 27 (9th Cir. 2000) (en banc) (§ 1915(e)(2)); *Resnick v. Hayes*, 213 F.3d 443, 446 n.1 (9th Cir.
 19 2000) (§ 1915A).

20 **A. Venue**

21 As an initial matter, Plaintiff has combined claims that arose in the County of San Luis
 22 Obispo with claims that have arisen from events while housed at RJD in San Diego County.
 23 These claims appear to be separate and distinct with no indication why Plaintiff filed them in the
 24 same action. Venue may be raised by a court sua sponte where the defendant has not yet filed
 25 a responsive pleading and the time for doing so has not run. *Costlow v. Weeks*, 790 F.2d 1486,
 26 1488 (9th Cir. 1986). “A civil action wherein jurisdiction is not founded solely on diversity of
 27 citizenship may, except as otherwise provided by law, be brought only in (1) a judicial district
 28 where any defendant resides, if all defendants reside in the same State, (2) a judicial district in

1 which a substantial part of the events or omissions giving rise to the claim occurred, or a
 2 substantial part of property that is the subject of the action is situated, or (3) a judicial district
 3 in which any defendant may be found, if there is no district in which the action may otherwise
 4 be brought.” 28 U.S.C. § 1391(b); *Costlow*, 790 F.2d at 1488; *Decker Coal Co. v.*
 5 *Commonwealth Edison Co.*, 805 F.2d 834, 842 (9th Cir. 1986). “The district court of a district
 6 in which is filed a case laying venue in the wrong division or district shall dismiss, or if it be in
 7 the interests of justice, transfer such case to any district in or division in which it could have
 8 been brought.” 28 U.S.C. § 1406(a).

9 Here, Plaintiff’s claims against Defendants Parkinson, County of San Luis Obispo, Ulloa,
 10 Mayes, Adams, Manpal and Rushing arose in San Luis Obispo County, California, which is
 11 within the jurisdictional confines of the Central District of California, Western Division. *See*
 12 28 U.S.C. § 84(c)(2) (“The Central District [of California] comprises 3 divisions.... (2) The
 13 Western Division comprises the counties of Los Angeles, San Luis Obispo, Santa Barbara and
 14 Ventura.”). The claims against these Defendants are not alleged to have arisen in the Southern
 15 District. *See* 28 U.S.C. § 84(d) (“The Southern District [of California] comprises the counties
 16 of Imperial and San Diego.”).

17 Therefore, venue as to the claims against Defendants Parkinson, County of San Luis
 18 Obispo, Ulloa, Mayes, Adams, Manpal and Rushing are properly brought in the Central District
 19 of California, Western Division, pursuant to 28 U.S.C. § 84(c)(2), but not in the Southern
 20 District of California. *See* 28 U.S.C. § 1391(b); *Costlow*, 790 F.2d at 1488. Accordingly, the
 21 Court dismisses the claims against Defendants Parkinson, County of San Luis Obispo, Ulloa,
 22 Mayes, Adams, Manpal and Rushing, without prejudice, for lack of proper venue. If Plaintiff
 23 wishes to pursue claims against these individual Defendants he should file a separate action in the
 24 Central District of California, Western Division.

25 **B. Illegal search claims**

26 The remainder of Plaintiff’s claims are far from clear, but he appears to allege that
 27 Defendant Flourney, a nurse at RJD, violated his constitutional rights by conducting “illegal
 28 body cavity searches.” (Compl. at 17-18.) The Fourth Amendment applies to a jail or prison’s

1 policy of strip searches of inmates. *See Bull v. City of San Francisco, et al.*, 595 F.3d 964, 974-
 2 75 (9th Cir. 2010) (en banc). When determining whether Plaintiff has stated a Fourth
 3 Amendment claim for an unreasonable search, the Court looks to whether the strip search was
 4 “reasonably related to legitimate penological interests.” *Id.* (citing *Turner v. Safley*, 482 U.S.
 5 78, 89 (1987)). “The reasonableness of a search is determined by reference to its context.” *Bull*,
 6 595 F.3d at 971 (citing *Michenfelder v. Sumner*, 860 F.2d 328, 332 (9th Cir. 1988)).

7 Plaintiff alleges no specific facts with regard to these visual body cavity searches.
 8 Plaintiff appears to object to the visual body cavity searches on the grounds that Defendant
 9 Flourney is a nurse and not a correctional officer. (*See* Compl. at 18.) Such a claim does not
 10 rise to the level of finding that the visual searches were “excessive, vindictive, harassing or
 11 unrelated to any legitimate penological interest.” *Michenfelder*, 860 F.3d at 332. Thus, the
 12 Court finds that Plaintiff has failed to allege a Fourth Amendment constitutional violation arising
 13 from visual body cavity searches.

14 **C. Due Process and Heck**

15 As currently pleaded, Plaintiff’s due process claims must be dismissed because they are
 16 premature under the doctrine set forth in *Heck v. Humphrey*, 512 U.S. 477, 486-87 (1994).
 17 Constitutional claims involving a prison’s disciplinary or administrative decisions to revoke
 18 good-time credits are subject to sua sponte dismissal pursuant to 28 U.S.C. § 1915(e)(2)(B)(ii)
 19 and 1915A(b)(1) since habeas corpus is the exclusive federal remedy whenever the claim for
 20 damages depends on a determination that a disciplinary judgment is invalid or the sentence
 21 currently being served is unconstitutionally long. *Edwards v. Balisok*, 520 U.S. 641, 643-44
 22 (1997); *Heck*, 512 U.S. at 486-87; *Preiser v. Rodriguez*, 411 U.S. 475, 500 (1973).

23 Here, Plaintiff alleges that he lost good time credits as a result of Defendants fabricating
 24 charges against him resulting in a disciplinary conviction. (*See* Compl. at 18.) In order to state
 25 a claim for damages under section 1983 based on these allegations under *Heck* and *Edwards*,
 26 however, Plaintiff must allege facts in his Complaint sufficient to show that Defendants’
 27 decision to remove his credits has already been “reversed on direct appeal, expunged by
 28 executive order, declared invalid by a state tribunal authorized to make such a determination, or

1 called into question by a writ of habeas corpus.” *Heck*, 512 U.S. at 486-87. Plaintiff has failed
 2 to do so; therefore, he must sufficiently amend his Complaint to provide such a showing before
 3 any cause of action for damages accrues under the Civil Rights Act. *Id.*

4 **D. Fourteenth Amendment Due Process Claims**

5 Even if Plaintiff were able to overcome the *Heck* bar, he has failed to state a Fourteenth
 6 Amendment due process claim. “The requirements of procedural due process apply only to the
 7 deprivation of interests encompassed by the Fourteenth Amendment’s protection of liberty and
 8 property.” *Board of Regents v. Roth*, 408 U.S. 564, 569 (1972). State statutes and prison
 9 regulations may grant prisoners liberty interests sufficient to invoke due process protections.
 10 *Meachum v. Fano*, 427 U.S. 215, 223-27 (1976). However, the Supreme Court has significantly
 11 limited the instances in which due process can be invoked. Pursuant to *Sandin v. Conner*, 515
 12 U.S. 472, 483 (1995), a prisoner can show a liberty interest under the Due Process Clause of the
 13 Fourteenth Amendment only if he alleges a change in confinement that imposes an “atypical and
 14 significant hardship . . . in relation to the ordinary incidents of prison life.” *Id.* at 484 (citations
 15 omitted); *Neal v. Shimoda*, 131 F.3d 818, 827-28 (9th Cir. 1997).

16 In this case, Plaintiff has failed to establish a liberty interest protected by the Constitution
 17 because he has not alleged, as he must under *Sandin*, facts related to the conditions or
 18 consequences of disciplinary hearing which show “the type of atypical, significant deprivation
 19 [that] might conceivably create a liberty interest.” *Id.* at 486. For example, in *Sandin*, the
 20 Supreme Court considered three factors in determining whether the plaintiff possessed a liberty
 21 interest in avoiding disciplinary segregation: (1) the disciplinary versus discretionary nature of
 22 the segregation; (2) the restricted conditions of the prisoner’s confinement and whether they
 23 amounted to a “major disruption in his environment” when compared to those shared by
 24 prisoners in the general population; and (3) the possibility of whether the prisoner’s sentence was
 25 lengthened by his restricted custody. *Id.* at 486-87.

26 Therefore, to establish a due process violation, Plaintiff must first show the deprivation
 27 imposed an atypical and significant hardship on him in relation to the ordinary incidents of
 28 prison life. *Sandin*, 515 U.S. at 483-84. Plaintiff has failed to allege any facts from which the

1 Court could find there were atypical and significant hardships imposed upon him as a result of
 2 the Defendants' actions. Plaintiff must allege "a dramatic departure from the basic conditions"
 3 of his confinement that would give rise to a liberty interest before he can claim a violation of due
 4 process. *Id.* at 485; *see also Keenan v. Hall*, 83 F.3d 1083, 1088-89 (9th Cir. 1996), *amended*
 5 *by* 135 F.3d 1318 (9th Cir. 1998). He has not; therefore the Court finds that Plaintiff has failed
 6 to allege a liberty interest in remaining free of Ad-seg, and thus, has failed to state a due process
 7 claim. *See May*, 109 F.3d at 565; *Hewitt*, 459 U.S. at 466; *Sandin*, 515 U.S. at 486 (holding that
 8 placing an inmate in administrative segregation for thirty days "did not present the type of
 9 atypical, significant deprivation in which a state might conceivably create a liberty interest.").

10 Accordingly, the Court finds that Plaintiff's Complaint fails to state a section 1983 claim
 11 upon which relief may be granted, and is therefore subject to dismissal pursuant to 28 U.S.C.
 12 §§ 1915(e)(2)(b) & 1915A(b). The Court will provide Plaintiff with an opportunity to amend
 13 his pleading to cure the defects set forth above. Plaintiff is warned that if his amended complaint
 14 fails to address the deficiencies of pleading noted above, it may be dismissed with prejudice and
 15 without leave to amend. Plaintiff's claims against the Defendants from San Luis Obispo are
 16 dismissed without leave to amend in this action but also without prejudice to pursue in a separate
 17 action filed in the Central District, Western Division.

18 **IV. CONCLUSION AND ORDER**

19 Good cause appearing, **IT IS HEREBY ORDERED** that:

20 1. Plaintiff's Motion to Proceed IFP pursuant to 28 U.S.C. § 1915(a) [ECF No. 3]
 21 is **GRANTED**.

22 2. Plaintiff's Motion for Appointment of Counsel [ECF No. 4] is **DENIED**.

23 3. The Secretary of California Department of Corrections and Rehabilitation, or his
 24 designee, shall collect from Plaintiff's prison trust account the \$350 balance of the filing fee
 25 owed in this case by collecting monthly payments from the account in an amount equal to twenty
 26 percent (20%) of the preceding month's income and forward payments to the Clerk of the Court
 27 each time the amount in the account exceeds \$10 in accordance with 28 U.S.C. § 1915(b)(2).
 28 **ALL PAYMENTS SHALL BE CLEARLY IDENTIFIED BY THE NAME AND NUMBER**

1 ASSIGNED TO THIS ACTION.

2 4. The Clerk of the Court is directed to serve a copy of this Order on Matthew Cate,
3 Secretary, California Department of Corrections and Rehabilitation, 1515 S Street, Suite 502,
4 Sacramento, California 95814.

5 **IT IS FURTHER ORDERED** that:

6 5. Defendants Parkinson, County of San Luis Obispo, Ulloa, Mayes, Adams, Manpal
7 and Rushing are **DISMISSED** pursuant to 28 U.S.C. § 84(c)(2), 28 U.S.C. § 1391(b) and 28
8 U.S.C. § 1406(a). The Clerk of Court is directed to terminate these Defendants from the docket.

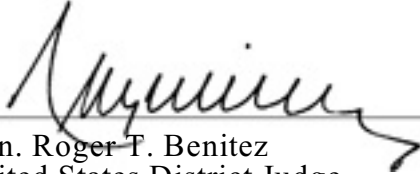
9 6. Plaintiff's Complaint is **DISMISSED** without prejudice for failing to state a claim
10 upon which relief may be granted. *See* 28 U.S.C. § 1915(e)(2) & § 1915A(b).

11 7. Plaintiff is **GRANTED** forty-five (45) days leave from the date this Order is filed
12 in which to file a First Amended Complaint which cures all the deficiencies of pleading noted
13 above. Plaintiff's Amended Complaint must be complete in itself without reference to his
14 original Complaint. *See* S.D. CAL. CIVLR 15.1. Defendants not named and all claims not re-
15 alleged in the Amended Complaint will be considered waived. *See King v. Atiyeh*, 814 F.2d 565,
16 567 (9th Cir. 1987). If Plaintiff fails to file an Amended Complaint within 45 days, this action
17 shall remain dismissed without further Order by the Court.

18 8. The Clerk of Court is directed to mail a Court approved § 1983 form to Plaintiff.

19 IT IS SO ORDERED.

20 DATED: October 11, 2011

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22 
23 Hon. Roger T. Benitez
United States District Judge